Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No.

76-1858

CHARLES ALEXANDER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, FIRST DEPARTMENT

HERBERT S. SIEGAL
Attorney for Petitioner
17 John Street
New York, New York 10038
(212) 732-5330

10826

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, FIRST DEPARTMENT

OPINIONS BELOW

There was no opinion rendered by the Appellate Division, First Department, in affirming the judgment of conviction, nor was any opinion rendered by the Hon. Hugh R. Jones, Associate Judge of the Court of Appeals, denying petitioner's application for leave to appeal to the Court of Appeals of the State of New York.

Hon. Mary Johnson Lowe, Acting Justice of the New York Supreme Court, Bronx County, rendered an opinion denying petitioner's motion to suppress. A copy of that opinion appears in the Appendix, *infra*, pp. 1a-5a.

JUDGMENT

The judgment of conviction and sentence was entered on May 18, 1976, in the office of the Clerk of the Supreme Court of the State of New York, Bronx County, convicting the petitioner of criminal sale of a controlled substance in the first degree, and sentencing the petitioner to 25 years to life.

The decision, affirming the judgment, without opinion, by the Appellate Division of the New York Supreme Court, First Department, was entered on February 10, 1977, in the office of the Clerk of the Appellate Division of the Supreme Court, First Department (Appendix, *infra*, pp. 6a-7a).

The certificate, denying leave to the petitioner to appeal to the Court of Appeals of the State of New York, was dated April 21, 1977 (Appendix, *infra*, pp. 7a-8a).

JURISDICTION OF THE COURT

Jurisdiction of this Court is conferred under Title 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Where the Omnibus Crime Control and Safe Streets Act of 1968 provides that only a publicly responsible person may be designated to make applications for a wiretap order, or extensions thereof, may the courts of New Jersey act under an existing statute that contravenes the provisions of the Omnibus Crime Control and Safe Streets Act of 1968?

2. May the courts of the State of New Jersey disregard the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, and receive applications for extensions of an existing wiretap order, and act favorably thereon, when those applications are made by a police officer, despite the decision of

the United States Supreme Court in the case of the *United States v. Giordano* (94 Sup. Ct. 1820, at page 1822) where the Court said:

> "Since Congress intended to condition the use of intercept procedures upon the judgment of a senior Justice Department official that the situation is one of those warranting their use, thus precluding resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use, it is evident that the provisions for pre-application approval was intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored."?

The petitioner does not argue that the granting of the original wiretap order, upon the application of an Assistant Prosecutor of Essex County, is improper. The petitioner is not concerned with the original wiretap order, with which he was not in any way connected. The petitioner is concerned with the disclosures by the New Jersey police to the New York authorities of information obtained by the New Jersey police during the tenure of 2 extension orders procured upon the applications of a police officer, in violation of the provisions of the Omnibus Crime Control and Safe Streets Act of 1968. These disclosures were the only basis for establishing probable cause in the courts of New York enabling the New York authorities to procure a wiretap order against the petitioner's telephone in New York.

There is no dispute, here, that the information disclosed to the New York authorities by the New Jersey police was the sole basis for attempting to establish probable cause by the New York authorities in procuring a wiretap order against the telephone of the petitioner, and triggered the action by the New York authorities against the petitioner.

The New York authorities conducted a surveillance of the petitioner, after the disclosure by the New Jersey police, without any result.

3. Where it appears that the courts of New York failed to pass upon the question of designation; that is, whether a designation to a police officer to make an application for an extension of an existing wiretap order is proper, does not the petitioner present an important question which ought to be decided by this Court; whether or not the New Jersey Statute, Chapter 2A:156A-8, is paramount to the federal statute, known as the Omnibus Crime Control and Safe Streets Act of 1968?

CONSTITUTIONAL PROVISIONS

United States Constitution, Fourth Amendment

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Fourteenth Amendment, Section 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Charles Alexander, was indicted on May 7, 1974, for the crimes of criminal sale of a controlled substance in the first degree, criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree.

After a trial by a jury, the petitioner was convicted of the crime of criminal sale of a controlled substance in the first degree.

Before trial, however, the petitioner moved the Supreme Court of the State of New York, Bronx County, to controvert a wiretap order, dated January 11, 1974 and for the suppression of certain evidence, specifically "any evidence and leads" obtained from the wiretap, because the alleged probable cause for the New York order was derived solely from a New Jersey investigation involving electronic surveillance, authorized by the Superior Court of the State of New Jersey, upon the applications of a police officer for extensions of the original wiretap order, which applications were approved by the Prosecutor of Essex County, New Jersey, and which applications for extensions were in violation of the Omnibus Crime Control and Safe Streets Act of 1968, then in effect, which provided amongst other things that applications for a wiretap order, or extensions thereof, must be made by the particular official designated so to do, or by a publicly responsible official appointed to make the applications by the particular official designated to do so, and a police officer was not such a publicly responsible official, and that therefore the orders of extensions issued by the Superior Court of the State of New Jersey were improvidently made and must fall, and that as a result the New York wiretap order must also fall, since it was

based on the disclosures by the New Jersey police to the New York authorities of information obtained under illegal orders of extensions issued by the New Jersey court.

Justice Lowe denied petitioner's motion to controvert and to suppress, relying on two decisions of the New Jersey courts; *State of New Jersey v. Sidoti,* 120 N.J. Super. 208, 293 A.2d 678 (1972) and *State v. Dye,* 60 N.J. 825, 291 A.2d 825 (1971), where it was noted that the electronic surveillance evidence had been obtained, pursuant to an order of the Superior Court, granted on sworn application of two detectives of the Somerset County Prosecutor's office, who sought the order upon the written authorization of the Prosecutor. Judge Lowe accepted the contention of the District Attorney that the actions of the Essex County Prosecutor were in compliance with N.J.S.A. Sec. 2A:156A-1 *et seq.* See Appendix, *infra,* for Justice Lowe's opinion, p. 5a.

Justice Lowe, however, failed to take into consideration the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, which was in effect at the time the applications for extensions of the original wiretap order were made and granted, and under which the New Jersey police intercepted wire or oral communications or evidence derived therefrom, and which information the New Jersey police disclosed to the New York authorities, thus triggering the action on the part of the New York authorities to procure a wiretap order from the New York courts against the telephone of the petitioner, and to procure an indictment against the petitioner.

The Omnibus Crime Control and Safe Streets Act of 1968 was construed by the United States Supreme Court, in the case of *United States v. Giordano,* 416 U.S. 517, 94 Sup. Ct. 1820 (1974). The Court held that the very purpose of the Omnibus Crime Control and Safe Streets Act of 1968 was to assure that a designated official should make or authorize a publicly responsible official to make an application for a wiretap order or for extensions thereof.

No state statute may contravene the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, and no official may erode the purposes of that act by any action contrary to its provisions.

A police officer is not a publicly responsible official, who may be designated to make applications for a wiretap order, or for extensions thereof.

The decisions relied upon by Justice Lowe in her opinion denying petitioner's motion to controvert and to suppress were made more than two years prior to the decision of the United States Supreme Court in *United States v. Giordano, supra.* Those decisions relied upon by Justice Lowe, which hold that N.J.S.A. Sec. 2A:156A-1 *et seq.* is the applicable law under which applications for a wiretap order, or extensions thereof, would be made, contravene the provisions of the Omnibus Crime Control and Safe Streets Act of 1968 and erode the purposes of that act by actions contrary to its provisions.

Justice Lowe in her opinion also refers to the case of *State v. Travis,* 125 N.J. Super. 1, 308 A.2d 78 (1973) wherein it is stated by the court "NJSA 2A: 156-A-8 by its plain language properly permits some delegation of authority to apply for wire-taps." Further, "in order that the New Jersey wire-tap law may be fully and reasonably implemented to achieve its purposes a county prosecutor may . . . appoint a qualified person as Acting Prosecutor with full powers of his office, who may invoke and authorize wire-tap applications under the New Jersey Wire-tap Act." Justice Lowe also cites the case of *United States v. Tortorella,* 480 F.2d 764 in support of the *Travis* opinion.

In the case at bar, the Prosecutor authorized a police officer to make the applications for the extensions, which is precisely what the petitioner objected to, because it failed to provide the mature judgment of a responsible public official to be interposed as a critical precondition to any judicial orders, as required by

the United States Supreme Court in the case of *United States v. Giordano, supra.*

The Omnibus Crime Control and Safe Streets Act of 1968, provides that "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter" (Sec. 2515).

Section 2517 provides "Any aggrieved person in any trial, hearing, or proceeding in or before any Court, department, officer, agency, regulatory body or other authority of the United States, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval."

There is no dispute that the petitioner is an aggrieved person, and entitled to move to suppress the contents of the intercepted wire or evidence derived therefrom, since it was admitted on the motion to suppress that, during the tenure of the extensions, the voice of the petitioner was heard on the wiretap, and the contents of the intercepted wiretap were disclosed by the New Jersey police to the New York authorities, triggering action on the part of the New York authorities against the petitioner by procuring from the New York courts a wiretap

order against the telephone of the petitioner, based on the contents of the intercepted wiretap by the New Jersey police during the tenure of the extensions procured illegally and in violation of the Omnibus Crime Control and Safe Streets Act of 1968, which was in full force and effect during 1973-1974 when the applications by a police officer for extensions of an existing wiretap order, and when the wire communication was intercepted by the New Jersey police and disclosed by them to the New York authorities.

It is clear from reading the decision of Justice Lowe, in denying petitioner's motion to controvert and to suppress (Appendix, 5a) that the question of designation to a police officer was not passed upon. Quoting from Justice Lowe's decision:

> "The balance of defendant's motion asserts illegality in the authorization of a detective to apply for two extensions of the initial New Jersey order. We note that the considerations germane to the original order are equally applicable to extensions. (See United States v. Bynum, 513 F.2d 533 (2d Cir. 1975) at 535). '* * * We agree that 18 USC 2518 (5) contemplates an authorization procedure for extensions similar to that for initial applications.'
>
> Cortorello and Travis, both supra, while approving some delegation of authority in this area, by their language limit such delegation to attorneys within the office of the principal prosecuting officer of the jurisdiction. However, the New Jersey statute is not explicit on this point, though it enumerates those persons who may authorize an ex parte application for an order, and who is to execute the warrant, it does not direct itself to the actual application process."

In view of all of the foregoing, Justice Lowe erred in denying petitioner's motion to controvert and to suppress, and the petitioner was prejudiced thereby, and resulted in petitioner being denied his Fourth and Fourteenth Amendment rights.

REASONS FOR GRANTING THE WRIT

1. The petitioner presents an important question which ought to be decided by this Court, namely, whether or not the provisions of N.J. Statute 2A:156A-1 *et seq.* are paramount to the provisions of federal statute entitled the Omnibus Crime Control and Safe Streets Act of 1968.

The petitioner contends that the provisions of the Omnibus Crime Control and Safe Streets Act of 1968 is superior to all state statutes on the issue of wiretapping. *United States v. Giordano, supra.*

If petitioner's contention is valid, then the New York Supreme Court (Lowe, J.) erred in relying on the New Jersey statute in denying petitioner's motion to controvert and to suppress.

2. It is of paramount importance for this Court to decide whether the provisions of the Fourth Amendment which are enforceable in the same manner and to like effect as other rights secured by the Due Process Clause are to be upheld in the case at bar.

Can the whim of any prosecutor who, in the name of law enforcement, chose to override the protection intended to be afforded by the Due Process Clause prevail? *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 108, 81 Sup. Ct. 1684 (1961).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Herbert S. Siegal
Attorney for Petitioner

APPENDIX

OPINION OF THE NEW YORK SUPREME COURT, DENYING PETITIONER'S MOTION TO SUPPRESS

SUPREME COURT

OF THE

STATE OF NEW YORK

S.C. Crim. No. 41
(rev. 6/75)

PART 201 COUNTY BRONX

Indictment Number 808

Present:

Hon. MARY JOHNSON LOWE,
J.S.C.

THE PEOPLE OF THE STATE OF NEW YORK

against

CHARLES ALEXANDER,

Defendant

Upon the foregoing papers this motion is disposed of in accordance with decision published simultaneously herewith.

Opinion filed,

J.S.C.

Opinion of the New York Supreme Court

SUPREME COURT : BRONX COUNTY

TRIAL TERM : PART 201

THE PEOPLE OF THE STATE OF NEW YORK

-against-

CHARLES ALEXANDER,

Defendant.

Ind. No. 808/74

MARY JOHNSON LOWE, J.:

The defendant was indicted on March 7, 1974, for the crimes of criminal sale of a controlled substance in the first degree, criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree.

Defendant now moves to controvert a wiretap order, dated January 11, 1974, signed by a justice of this court and for the suppression of certain evidence, specifically "any evidence and leads" obtained from the wiretap herein considered.

The defendant claims that as the probable cause for the New York order is derived solely from a New Jersey investigation involving electronic surveillance authorized by an orginal order and two extensions thereof, and that as the Essex County prosecutor "improperly" authorized an assistant county prosecutor to make application for the original order, and further "improperly" authorized the execution of two applications for extension of the original order by a detective

Opinion of the New York Supreme Court

assigned to his office, the approval of the order and extensions by a judge of the Superior Court of the State of New Jersey was not in compliance with applicable New Jersey law.

Defendant concludes that the New Jersey order must fail and that as a result the New York order must also fail.

The question, therefore, is whether the delegation by the County Prosecutor of his statutory authority in authorizing applications for an order and extensions of such order by an assistant county prosecutor and a detective satisfied the requirements of the New Jersey statute (NJSA §2A:156A-1 et seq.) and whether such delegation is permissible.

In his memorandum of law, the District Attorney contends that the actions of the Essex County Prosecutor are in compliance with NJSA §2A:156A-1 et seq., and cites in support State v. Sidoti, 120 N.J. Super. 208, 293 A.2d 678 (1972) and State v. Dye, 60 N.J. 825, 291 A.2d 825 (1971). In Dye (at page 827) the court, in affirming the conviction of defendant for bookmaking, noted that electronic surveillance evidence had been obtained "* * * pursuant to an order of the Superior Court, granted on sworn application of two detectives of the Somerset County Prosecutor's office, who sought the order upon the written authorization of the Prosecutor." In Sidoti, supra, the court, in reversing the suppression of evidence obtained by electronic surveillance, stated at page 680: "* * * respondents contend * * * [the] wiretaps were illegal because the prosecutor failed to apply personally for the orders but authorized named detectives in his office to do so. These contentions are without merit (see State v. Dye, 60 N.J. 518, 291 A.2d 825 [1972])."

There appears to be no barrier to the approval of the application by an assistant county prosecutor where, as here, such assistant has obtained written authorization from the

County Prosecutor (see NJSA §§2A:156A-8, 9, 12); see also State v. Travis, 125 N.J. Super. 1, 308 A.2d 78 [1973] (at 82). "NJSA 2A:156 A-8 by its plain language, properly permits *some delegation of authority to* apply for wiretaps" (emphasis added). Further, "in order that the NEW JERSEY WIRETAP ACT may be fully and reasonably implemented to achieve its purposes a county prosecutor may * * * appoint a qualified person as *Acting Prosecutor* with full powers of his office, who may invoke and authorize wiretap applications under the NEW JERSEY WIRETAP ACT" (emphasis added). Similarly, see United States v. Tortorello, 480 F.2d 764 (2d Cir. 197) cert. den 414 U.S. 866, wherein the court, in approving an application for an eavesdropping order by a New York County Assistant District Attorney, stated: "We find nothing in that provision (18 USC 2516 [2]) to require the appearance of the principal prosecuting attorney before the issuing state judge * * *. The purpose of the provision can be effectively attained by having the chief prosecuting officer pass on applications which his assistants prepare and, after he has approved them, having them presented to the presiding judge. That objective will not be furthered by requiring the chief prosecuting officer to appear personally before the issuing judge. His assistants usually are in a better position to *answer questions concerning probable cause,* the only practical justification for requiring a personal appearance." "* * * a person such as [a District Attorney] * * * who merely reviews the application to determine whether, as a matter of policy, the electronic surveillance should be undertaken would not be in the best position to answer such questions."

This court concludes that the application, upon written authorization by the assistant county prosecutor, was consistent with the New Jersey and federal statutes. That branch of defendant's motion asserting the illegality of such actions is therefore denied.

The balance of defendant's motion asserts illegality in the authorization of a detective to apply for two extensions of the initial New Jersey order. We note that the considerations germane to the original order are equally applicable to extensions. (See United States v. Bynum, 513 F.2d 533 [2d Cir. 1975] at 535.) "* * * [W]e agree * * * that 18 USC 2518 [5] contemplates an authorization procedure for extensions similar to that for initial applications."

Tortorello and Travis, both supra, while approving some delegation of authority in this area by their language limit such delegation to attorneys within the office of the principal prosecuting officer of the jurisdiction. However, the New Jersey statute is not explicit on this point, though it enumerates those persons who may authorize an ex parte application for an order, and who is to execute the warrant, it does not direct itself to the actual application process.

The New Jersey courts have examined this question and have implicitly approved the authorization of extension applications by detectives assigned to the county prosecutor's office (State v. Sidoti, supra; State v. Dye, supra) and, therefore, the defendant's contention that the evidence obtained as a result of the extensions of the original New Jersey order may not supply probable cause for the New York order is unfounded.

This motion to controvert the New York wiretap order and to suppress the evidence overheard, pursuant to CPL 710.20, is denied.

DATED: January , 1976

J. S. C.

ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT AFFIRMING JUDGMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 10, 1977

Present Hon.

Francis T. Murphy, Jr., Justice Presiding,
Samuel J. Silverman,
Louis J. Capozzoli,
Myles J. Lane,
Arthur Markewich, Justices.

The People of the State of New York,

Respondent,

-against-

Charles Alexander,

Defendant-Appellant.

4078

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Drohan, J.), rendered on May 18, 1976, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree, and said appeal having been argued by Mr. Herbert S. Siegal of counsel for the appellant, and by Gail Geisinger of counsel for the respondent; and due deliberation having been had thereon,

Order of the Appellate Division

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

JOSEPH J. LUCCHI
Deputy Clerk.

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

ORDER OF HON. HUGH R. JONES, ASSOCIATE JUDGE OF THE COURT OF APPEALS DENYING PETITIONER'S APPLICATION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. HUGH R. JONES, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

CHARLES ALEXANDER,

Appellant.

I, HUGH R. JONES, Associate Judge of the Court of

Order of Hon. Hugh R. Jones

Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Utica, New York
April 21, 1977

s/ Hugh R. Jones
Associate Judge

N.J.S.A. SECTION 2A:156A-1, *ET SEQ.*

The New Jersey Administration of Civil and Criminal Justice, Chapter 2A:156A-8, reads as follows:

"ORDER AUTHORIZING INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS.

The Attorney General, a county prosecutor or the chairman of the State Commission of Investigation when authorized by a majority of the members of that commission or a person designated to act for such an official and to perform his duties in and during his actual absence or disability may authorize in writing, an ex parte application to a Judge designated to receive the same for an order authorizing the interception of a wire or oral communication by

* Description of Order: Order Appellate Division, First Department, entered February 10, 1977, affirming judgment of Supreme Court, Bronx County, rendered May 18, 1976 (conviction of criminal sale of a controlled substance first degree).

Order of Hon. Hugh R. Jones

the investigative or law enforcement officers or agency having responsibility for an investigation when such interception may provide evidence of the commission of the offense of . . . dealing in narcotic drugs . . . or any conspiracy to commit any of the foregoing offenses or which may provide evidence aiding in the apprehension of the perpetrator of any of the foregoing offenses."